RIDDLE RANCHES, INC.

v.

BUREAU OF LAND MANAGEMENT
(ON JUDICIAL REMAND)

IBLA 98-477 Decided April 3, 2000

Further proceedings in Riddle Ranches, Inc. v. Bureau of Land Management, 138 IBLA 82 (1997), pursuant to stipulated settlement of Riddle Ranches, Inc. v. Babbitt, No. 97-0265-S-LMB (D. Idaho April 7, 1998).

Decision in Riddle Ranches, Inc. v. Bureau of Land Management, 138 IBLA 82 (1997), vacated; case files referred to the Hearings Division.

1. Administrative Procedure: Adjudication--Board of Land Appeals--Rules of Practice: Appeals: Board of Land Appeals

   On appeal from a decision of an Administrative Law Judge, the Board of Land Appeals possesses all of the powers which the Judge had in making his initial decision. Accordingly, where the record establishes that an Administrative Law Judge applied the wrong standard of proof to the detriment of an appellant, it is within the authority of the Board to review the record de novo and apply the correct legal standard without remanding the matter to the Hearings Division.

2. Administrative Procedure: Adjudication--Board of Land Appeals--Rules of Practice: Appeals: Board of Land Appeals

   Whether the Board will, in any given appeal, exercise its full de novo review authority is a matter committed to its discretion. Where the parties allege and make a preliminary showing that, subsequent to a hearing, new information has come to

> light which directly bears on the matter at issue, the Board will normally decline to exercise its de novo review authority and will, instead, remand the matter to the Hearings Division for a new fact-finding hearing.
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> Riddle Ranches, Inc. v. Bureau of Land Management, 138 IBLA 82 (1997), vacated.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for Riddle Ranches, Inc.; Ken Sebby, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision styled Riddle Ranches, Inc. v. Bureau of Land Management (BLM), 138 IBLA 82 (1997), this Board affirmed a September 8, 1993, decision of Administrative Law Judge John R. Rampton, Jr., as amended and clarified on October 4, 1993, which had upheld a BLM decision to delay the season of authorized grazing use for the Riddle Allotment from March 16 to May 1, commencing after 1992, and found the initial stocking rate of active livestock use to be properly set at 23,088 animal unit months.

Before the Board, Riddle Ranches, Inc. (Riddle), had challenged Judge Rampton's decision on the grounds, inter alia, that he had inappropriately invoked a requirement that Riddle could only prevail by making "a clear showing of error" in the BLM decision, rather than applying the correct standard, i.e., preponderance of the evidence. In its decision, while the Board agreed that "Judge Rampton used the words 'a clear showing of error' in his decision," the Board declined to reverse his determinations based on its conclusion that "an examination of his reasoning shows that he actually applied the preponderance test." Id. at 84. Riddle thereupon pursued an appeal of the Board's decision in Federal court challenging that part of the decision which affirmed the delay in its season of use.

On April 7, 1998, the United States District Court for the District of Idaho approved a stipulated settlement to Riddle's lawsuit. See Riddle Ranches, Inc. v. Babbitt, No. 97-0265-S-LMB (D. Idaho April 7, 1998). The parties stipulated that the decisions of Judge Rampton and the Board would be set aside to the extent that they had approved the deferment of the commencement of Riddle's grazing use from March 16 to May 1 each year. The stipulation further provided that, pursuant to 43 C.F.R. ' 4.29, the issue would be remanded to this Board "to apply the proper standard of proof ('preponderance of the evidence' standard) to its review of said deferment." Id. at 6. The stipulation also provided that the 1998 grazing season would commence on April 16, 1998, while subsequent grazing seasons would commence on April 7, pending a final decision by the Department of the Interior in the matter.

On September 17, 1998, Riddle filed a motion to open an appeal file and requested that the Board order BLM to submit the administrative record and establish a briefing schedule pursuant to 43 C.F.R. ' 4.29. By Order dated May 20, 1999, the Board directed BLM to submit the administrative record and requested that the parties submit reports recommending procedures to be followed to implement the Court's order as provided by 43 C.F.R. ' 4.29. Pursuant thereto, both parties have submitted their recommendations as to how the Board should proceed.

BLM has recommended three possible courses of action. First, it recommends that the Board review the record under the proper legal standard and reissue its decision in compliance with that standard. Alternatively, it recommends that the Board remand the matter to the Hearings Division with instructions that it be referred, on a contract basis, to Administrative Law Judge Rampton, who has since retired, for review under the proper legal standard. Finally, should the Board decline to accept either of its first two recommendations, BLM requests that the Board refer the record to the Hearings Division for the assignment of another Administrative Law Judge to review the record under the proper legal standard.

For its part, Riddle objects, on two discrete bases, to having the Board review the present record and apply the proper standard to the evidence therein developed. First, it argues that it would be improper for the Board to do so both under its own precedents, citing Eason v. BLM, 127 IBLA 259 (1993), as well as under Federal court precedents, most particularly Cardoza-Fonseca v. U.S.I.N.S., 767 F.2d 1448 (9th Cir. 1985), aff'd, 480 U.S. 421 (1987). Second, it objects to limiting consideration to only the record as was developed at the 1990 hearing, arguing that, given the length of time which has transpired, both sides should be allowed to introduce new evidence concerning the effects which on-going grazing has had on the forage within the Riddle allotment. Riddle has provided affidavits from two of its experts detailing "new" studies which, it asserts, directly bear on the correctness of BLM's claim that Riddle's March 16 turnout date was adversely affecting the preferred species within its allotment.

[1] Notwithstanding Riddle's first argument, it is clear that the Board could, if it so desired, review the present record under the proper legal standard and enter a final Departmental decision at the present time. Thus, it has been noted that "in matters of adjudication properly before this Board its authority is coextensive with that of the Secretary." Exxon Company, U.S.A, 15 IBLA 345, 353 (1974); see also Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981); Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976). Included in this grant is the full de novo review authority of the Secretary. See, e.g., Melvin Helit, 146 IBLA 362, 367 (1998); United States v. Waters, 146 IBLA 172, 184-85 (1998); National Wildlife Federation, 145 IBLA 348, 362 (1998). United States v. Miller, 138 IBLA 246, 277-78 (1997).

Moreover, it has been expressly noted within the context of grazing appeals that:

> [O]n appeal from a decision of an Administrative Law Judge, the Board of Land Appeals has all the powers that the Judge had in making his initial decision. 5 U.S.C. ' 557(b)(1970). Therefore, this Board may make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance.

Eldon Brinkerhoff, 24 IBLA 324, 337-38, 83 I.D. 185, 190 (1976). See also Klump v. BLM, 130 IBLA 119, 140 (1994). Indeed, the Board's authority has been deemed sufficiently broad so as to allow it to take notice of official records of the Department on appeal which were not noted by the Administrative Law Judge in the initial consideration of the case (Briggs v. BLM, 99 IBLA 137, 142 (1987)), as well as to take cognizance of evidence submitted for the first time on appeal (W&T Offshore, Inc,, 148 IBLA 323, 359 (1999)).

The cases cited by appellant are simply inapposite to the question of the scope of the Board's authority on matters properly brought before it. While the decision in Eason v. BLM, 127 IBLA 259 (1993), did remand a grazing case to the Administrative Law Judge with instructions to apply the right standard of proof, i.e., preponderance of the evidence, the predicate of that decision was the view of the panel which ruled on the case that, inasmuch as the Administrative Law Judge "had the benefit of viewing the demeanor of the witnesses during their testimony," referral of the matter back to the judge would most appropriately achieve the ends of justice. Id. at 263.

The Eason decision, however, did not purport to base its action on a determination that the Board could not decide the matter. Rather, in so acting, the panel merely exercised its discretion not to review the case de novo at that time. This action is consistent with Board precedents which have noted that, while the Board may, if it so desires, exercise full de novo review in any appeal, it need not do so in every case. See, e.g., Cook Inlet Region, Inc., 149 IBLA 313, 322 (1999); Kenneth H. Bunch, 37 IBLA 346, 351 (1978). Moreover, it is useful to note that when the Eason appeal was subsequently before the Board after a decision on the remand, the Board expressly exercised its de novo review authority. See Eason v. BLM, 145 IBLA 78, 89 (1998). Thus, nothing in the Board's decision in Eason v. BLM, 127 IBLA 259 (1993), would compel a conclusion that the Board could not, consistent with its delegated authority and precedential interpretations thereof, review the record developed at the 1992 hearing and apply the proper legal test to the evidence adduced.

The Ninth Circuit's decision in Cardoza-Fonseca is simply not on point. Riddle relies on the following language from the Court's decision:

> It is beyond question that under the law of our circuit * * * the Board erred in applying the strict "clear probability" standard to petitioners's asylum claims. This is not an

> error we can remedy on appeal. "An agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself." * * * This rule applies to decisions by the Board of Immigration Appeals just as it applies to other agency determinations.
>
> We do not believe that we should attempt to apply the [correct] standard to the instant claims before the Board has performed the task itself.

Cardoza-Fonseca v. U.S.I.N.S., supra at 1454-55. Based on the foregoing, Riddle argues that:

> In the present case, the Board in Riddle Ranches, Inc. v. BLM did what the Ninth Circuit did not permit in Cardoza-Fonseca. In other words, the Board attempted to apply -- by conjecture -- the correct standard, instead of allowing the ALJ to perform that task for himself. Therefore, the Board should now not make that mistake again, but should remand the matter to the ALJ to perform the task of applying the correct standard, i.e. "preponderance of the evidence" standard.

(Report and Recommendations of Riddle Ranches, Inc., at 29.) Riddle's argument, however, flows from a fundamental misapprehension of the basis of the Court's decision in Cardoza-Fonseca.

Initially, we note that Riddle is analogizing the Court's relationship vis-a-vis the INS Board with the Board's relationship to the individual administrative law judges. The relationship of the Federal courts to an agency, however, is simply not analogous to the relationship which exists between agencies (the Board, in this case) and administrative law judges. Indeed, section 557(b) of the Administrative Procedure Act (APA), 5 U.S.C. ' 557 (1994), expressly provides that "[o]n appeal from or review of an initial decision, the agency has all the powers which it would have in making the initial decision." This is to be contrasted with the more limited scope of review provided in the APA when courts are reviewing agency determinations thereunder. See 5 U.S.C. ' 706 (1994). Thus, while the Court in Cardoza-Fonseca clearly concluded that it would not attempt to apply the proper standard but would instead remand the matter to the agency for its application, nothing in the decision suggested that the agency, itself, was precluded from initially applying the correct standard. In fact, the decision expressly holds to the contrary.

In Cardoza-Fonseca, the Court determined that both the immigration judge and the INS Board had applied the wrong legal standard in determining whether petitioners had established their eligibility for asylum under section 208(a) of the Refugee Act of 1980, 8 U.S.C. ' 1158(a) (1982). However, in remanding the matter to the agency, the Court did not suggest that the INS Board should, itself, refer the matter to the immigration

judge for his initial application of the correct standard. On the contrary, the Court remanded the matter to the INS Board "so that the Board may evaluate those claims under the proper legal standard." Id. at 1455. Thus, application of the actual holding of Cardoza-Fonseca to the instant case would support rather than undermine BLM's request that the Board decide the case on the present record applying the correct legal standard. It is clear that Riddle's assertion that the Board lacks the authority to review the record under the correct legal standard and apply the preponderance of the evidence test thereto cannot be sustained.

[2] Notwithstanding the foregoing, however, we have concluded that the interests of justice would be better served by remanding the entire matter to the Hearings Division to permit the introduction of new evidence relating to the question of the proper turnout date for the Riddle allotment. As noted above, Riddle objects to limiting the review mandated by the Court-approved stipulation to the record as it presently exists. Rather, it asserts that the record should be expanded to include data which has been developed subsequent to the 1992 hearing and which allegedly undercuts and contradicts various assertions of BLM's experts. As part of a proffer, Riddle has included the affidavits of two of its experts. Without going into great detail at the present time, these affidavits assert, inter alia, that data collected subsequent to the 1992 hearing support the utilization levels which Riddle had used at the hearing (Steninger Affidavit at 14) and also show that the deleterious impacts which BLM had predicted would result from the early turnout date, such as reductions in preferred plant species and perennial grasses, have not only not occurred (Steninger Affidavit at 6, 9-10; Smith Affidavit at 17-18), but that the data indicates that the overall condition of the range has improved since 1980 (Steninger Affidavit at 17-20; Smith Affidavit at 13-14).

The ratio decidendi of the original BLM decision with respect to the change in the season of use was that continuation of the present season of use with the March 14 turnout date would result in a continued decline in preferred species and a failure of the Riddle allotment to achieve the goals of the Bruneau-Kuna Management Framework Plan (BMFP) relating to the improvement of the ecological status of areas rated poor or fair. Riddle argues that the information developed since the 1992 hearing establishes that BLM's fears as to these elements were not well-based while Riddle's claims with respect to on-going trends have been borne out by subsequent data.

If, indeed, recent studies have established that the March 14 turnout date is not adversely affecting preferred species growth or the realization of the BMFP's ecological condition objectives, the correctness of BLM's determination to delay the season of use would, arguably, be fatally compromised. While Riddle has presented affidavits and studies assertedly showing that this is the case, we believe that these are the types of

expert opinions which are best tested in the context of an adversary proceeding where they may be subject to rigorous cross-examination. Accordingly, we feel it is appropriate in this case, as well as consistent with numerous precedents (see e.g., United States v. Memmott, 132 IBLA 283, 287 (1995); United States v. Koenig, 99 IBLA 396, 401 (1987); United States v. Edeline, 24 IBLA 34, 37 (1976)), not to exercise our de novo authority at the present time but to remand this matter to the Hearings Division for the assignment of an administrative law judge for the purpose of conducting a new fact-finding hearing with respect to the issue of season of use.

We note that BLM has suggested that, if the Board were to remand the matter to the Hearings Division, it should do so with instructions that it be assigned to Judge Rampton, who has retired, on a contract basis. We decline to so direct.

While, in its early days, the Board occasionally specified in an order of remand that the case be returned to the Administrative Law Judge who rendered the initial decision (see, e.g., United States v. Foresyth, 15 IBLA 43, 61 (1974); United States v. Wells, 11 IBLA 253, 263 (1973)), this practice was ultimately abandoned in light of fears that it might be deemed improper for the Board to, in effect, designate the specific Administrative Law Judge who would conduct the hearing. The practice developed, which has continued to the present time, of simply remanding the case to the Hearings Division without any specific designation of a trier of fact. See, e.g., United States v. Galbraith, 134 IBLA 75, 107 (1995); United States v. Feezor (On Reconsideration), 81 IBLA 94, 99 (1984). That the same Administrative Law Judge who rendered the initial decision is almost always assigned to conduct any additional hearings ordered by the Board is doubtless the result of a recognition by the Hearings Division that judicial economy is usually best served by returning the case to a Judge already well-versed with the issues. But this is a choice that is for the Hearings Division to make. Accordingly, while we are remanding the matter to the Hearings Division, we deem it inappropriate to comment upon to whom the matter should be assigned.

At the new hearing which we are ordering, the entire record developed at the first hearing should be admitted into evidence. See United States v. Galbraith, supra at 87-90. We recognize, of course, that much of this record is directed to matters other than the season of use issue. Counsel are therefore encouraged to arrive at a preliminary agreement as to what portions of the prior record are germane to the season of use issue and to expressly designate those portions so as to obviate the necessity of any decision-maker being required to wade through great amounts of material which has no present relevancy. Insofar as any new evidence is concerned, such evidence should be submitted to the assigned Administrative Law Judge in the proper course and subject to the necessary showings as to relevancy and materiality.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision of the Board styled Riddle Ranches, Inc. v. BLM, reported at 138 IBLA 82

(1997), is hereby vacated and the case files are remanded to the Hearings Division for the assignment of an Administrative Law Judge in accordance with the foregoing. We also note that, consistent with the stipulated settlement, Riddle shall be allowed to commence grazing use of the allotment beginning on April 7, until such time as the matter is finally resolved within the Department.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge